90-1200

NO.

FILED
JAN 10 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES FIRE INSURANCE CO.,
Petitioner

versus

RIVERSIDE VENTURES, INC., and
NO NAME TOWING, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Of Counsel:
Henry J. Read

A. Gordon Grant, Jr.
MONTGOMERY, BARNETT,
BROWN, READ, HAMMOND
& MINTZ
3200 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-3200
(504) 585-3200
Counsel of Record for Petitioner

January 10, 1991

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether this Court should exercise its supervisory authority and reverse a Court of Appeal's decision, where the appellate court overstepped the bounds of its authority under Rule 52(a) of the Federal Rules of Civil Procedure by substituting its own factual findings for those of the trial court and thereby avoided a legal issue properly presented and ripe for determination, an issue of vital importance to maritime commerce, the environment, and the safety of persons employed in the maritime industry, to wit: whether, a vessel owner may knowingly and deliberately operate a leaking vessel so unseaworthy as to require constant pumping to stay afloat without forfeiting the coverage of the Inchmaree clause in a policy of marine insurance, on the theory that the master's failure to perform the necessary pumping, and not the unseaworthy condition of the vessel, was the sole cause of the loss.

PARTIES, PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES

All parties appear in the caption of the case. Petitioner, United States Fire Insurance Company, is wholly owned by Crum & Forster Corporation, which in turn is wholly owned by Xerox Financial Services, Inc., which is wholly owned by Xerox Corporation. Respondents, Riverside Ventures, Inc. and No Name Towing, Inc., have no parent companies or non-wholly-owned subsidiaries.

TABLE OF CONTENTS

Questions Presented for Review i

Parties, Parent Companies and Non-Wholly-Owned Subsidiaries ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Rule of Court 2

Statement of Facts 3

Reasons for Granting the Writ 6

Conclusion 13

Appendix A A-1

Appendix B A-3

Appendix C A-8

TABLE OF AUTHORITIES

CASES **Page**

Aquirre v. Citizens Cas. Co. of N.Y., 441 F.2d 141, 144 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971) 8

Amadeo v. Zant, ____U.S.____, 108 S.Ct. 1771, 1777 (1988) 9,10

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511 (1985) 9,10,11

Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968, 976 (5th Cir. 1978) 9

Hercules Carriers, Inc. v. Claimant State of Florida, 768 F.2d 1558, 1565 (11th Cir. 1985) 8

Matter of Multiponics, Inc., 622 F.2d 709, 723 (5th Cir. 1980) 9,10

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969) 9

Other

Rule 52(a) of the Federal Rules of Civil Procedure 2,7,8-9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

UNITED STATES FIRE INSURANCE CO.,
Petitioner

versus

RIVERSIDE VENTURES, INC., and
NO NAME TOWING, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in United States Fire Insurance Co. v. Riverside Ventures, Inc. and No Name Towing, Inc. (5th Cir. No. 90-3083; Sept. 12, 1990).

OPINIONS BELOW

In an unpublished *per curiam* opinion, the United States Court of Appeals for the Fifth Circuit issued its decision on September 12, 1990. That decision is reprinted *infra* at App. A3-A7. The court of appeals denied petitioner's petition for rehearing on October 12, 1990, which decision is printed *infra* at App. A1-A2. The United States District Court for the Eastern District of Louisiana issued

its Memorandum Opinion on January 17, 1990. That unreported decision is printed *infra* at App. A8-A24.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 12, 1990 (App. A3-A7). A timely petition for rehearing was denied on October 12, 1990 (App. A1-A2). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RULE OF COURT

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Find-

> ings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). [emphasis added].

STATEMENT OF FACTS

This case arises out of the capsizing and sinking of the M/V NO NAME #3 on the Mississippi River on November 17, 1987. United States Fire Insurance Company had issued a policy of marine hull insurance on the M/V NO NAME #3. As a result of the capsizing and sinking, the vessel sustained damage for which the owners and operators, Riverside Ventures, Inc. and No Name Towing, Inc., presented a claim under the hull policy issued by U.S. Fire.

U. S. Fire denied the claim on the grounds that the owners failed to exercise due diligence in knowingly operating an unseaworthy vessel and instituted a declaratory judgment action in the U.S. District Court for the Eastern District of Louisiana seeking a judgment that the policy did not afford coverage for the loss. No Name Towing counter-claimed. The district court had jurisdiction over U. S. Fire's declaratory judgment action under the general maritime law pursuant to 28 U.S.C. § 1333 and by virtue of diversity of citizenship pursuant to 28 U.S.C. § 1332. The district court had jurisdiction over respondents' counter-claim pursuant to 28 U.S.C. §§ 1332 and 1333 and pendent jurisdiction over their state law claim pursuant to Rule 13(a) of the Federal Rules of Civil Procedure.

The issue presented to the trial court was whether there was coverage under the Inchmaree clause of U.S.Fire's hull policy for a loss caused concurrently by the owner's want of due diligence and the master's negligence.

The Inchmaree clause provided that:

> This insurance also covers loss of or damage to the vessel named herein directly caused by:
>
> Accidents in loading, discharging or handling cargo, or in bunkering;
> Accidents in going on or off, or while on drydocks, graving docks, ways, marine railways, gridirons or pontoons;
> Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);
> Breakdown of or accidents to nuclear installations or reactors not on board the vessel named herein;
> Contact with aircraft, rockets or similar missiles, or with any land conveyance;
> Negligence of charterers and/or repairers, provided such charterers and/or repairers are not assured(s) hereunder;
> Negligence of master, mariners, engineers or pilots;
>
> *provided such loss or damage has not resulted from want of due diligence by the assured, the owners or managers of the vessel, or any of them.* [App. A9-A10] (emphasis added.)

The district court concluded that water flooding the NO NAME's bow compartment caused the vessel to lose stability, capsize and sink. [App. A13-A14] The district court concluded that the water entered the vessel through wasted holes located along the juncture of the bow bulwark and the forward deck. [App. A16-A17] Significantly, the

district court concluded that the wasted holes rendered the NO NAME unseaworthy. [App. A18-A19]

The trial court also concluded that Riverside and No Name Towing breached their due diligence obligations under the Inchmaree clause because they knew of the unseaworthy condition, through the knowledge of their Port Captain and Assistant Port Captain. The court stated that "**this persistent problem, serious enough to require pumping virtually every day, should have caused Riverside's shoreside managers to determine the cause of the ingress of the water into the bow void and to repair it. Certainly they knew of the problem.**" [App. A20]

The district court concluded that the master of the NO NAME #3 was negligent for continuing to operate an unseaworthy vessel that was taking on water, but despite these factual findings and contrary to the language and structure of the Inchmaree clause, the district court further concluded that the master's negligence constituted a superseding, separate, intervening cause of the casualty and the loss of the NO NAME #3. [App. A23]

U. S. Fire appealed from the district court's Judgment on the grounds that its legal conclusion is inconsistent with its Findings of Fact and is erroneous as a matter of law. On appeal, all parties requested oral argument. However, after the parties filed their briefs, the court of appeal placed the case on its summary calendar and, by *Per Curiam* Opinion dated September 12, 1990 affirmed the trial court's decision, finding that the loss was due to the negligence of the captain in continuing to operate the vessel after the failure of a temporary pump. Contrary to the findings of the trial court, the court of appeal concluded that the holes in the deck alone did not render the vessel unseaworthy, but that the unseaworthiness was due to the

inoperative pump. [App. A6] The appellate court further concluded that neither the owners nor the assureds had any knowledge of the unseaworthy condition created by the failure of the pump. As a result, the court of appeal found that the "exculpatory provision of the Inchmaree clause does not bar coverage in this case." [App. A6-A7] On the basis of those conclusions, the appellate court affirmed the judgment of the trial court. The court of appeal denied U. S. Fire's timely petition for rehearing on October 12, 1990.

REASONS FOR GRANTING THE WRIT

At a time when issues relating to public safety and the environment are demanding and receiving increased attention from our courts, the decision in this case quite literally encourages vessel owners to operate vessels which are dangerously unseaworthy and thereby increases the risk of maritime casualties, including the risk of pollution, and risk to the life and safety of persons employed in the maritime industry. The court of appeal's summary disposition of this case deprived the parties of a full and fair hearing on an issue of major significance. The court of appeals has, for the first time, condoned as "standard operating procedure" the navigation of a vessel so unseaworthy as to require continual pumping to keep it afloat. Starkly put, the opinion of the appellate court *encourages* vessel owners to operate unseaworthy vessels. It encourages a vessel owner to blame the vessel's master for *not* taking whatever extra precautions are required to compensate for a vessel's unseaworthiness. The appellate court clearly increased the risk of casualties which may cause collisions, pollution and injury to or death of seamen who earn their living aboard unseaworthy vessels.

This Court should grant the writ because the court of appeals has departed so far from the accepted course of

judicial proceedings as to require the exercise of this Court's supervisory powers. The court of appeals affirmed the trial court's judgment on the basis of *its own factual findings substituted for and contrary to the unchallenged facts found by the trial court,* all without concluding that the findings of the trial court were "clearly erroneous." Such action is contrary to the requirements of Rule 52(a) of the Federal Rules of Civil Procedure, and controlling precedent of this Court, particularly in light of the overwhelming evidence supporting the district court's factual findings.

The issue presented to both courts below was whether the Inchmaree clause of a marine hull policy affords coverage for the capsizing and sinking of a continually leaking, unseaworthy vessel, where the casualty results *concurrently* from the owner's want of due diligence (which permitted the unseaworthy condition to persist) and the master's negligent failure to assure adequate pumping. The district court clearly found facts which support the legal conclusion that the Inchmaree clause in this case does not afford coverage for the casualty. The capsizing and sinking occurred because water entered the vessel's bow compartment through wasted holes, known to the owners, and because the master negligently failed to pump the bow compartment. The district court concluded that these wasted holes constituted an unseaworthy condition which resulted from the owners' failure to use due diligence. In spite of these factual conclusions based on overwhelming evidence, the trial court erred as a matter of law by improperly substituting a tort-based superseding cause analysis in place of the applicable legal rule defined by the Inchmaree clause of U.S. Fire's policy. The district court thus avoided the real policy issue by applying an incorrect legal standard. The Fifth Circuit affirmed the district court's judgment without addressing the basic policy issue and compounded the district court's error by creating for

decision an entirely different case. By rendering its own findings regarding unseaworthiness and the owner's knowledge thereof, the court of appeal excised the policy requirements of due diligence from the case, when that provision is in fact and in law the heart of this litigation.

The court of appeal could only reach its result by implicitly reversing the trial court's factual findings regarding the unseaworthiness of the vessel and the owner's knowledge of the unseaworthiness. In so doing, it overstepped the bounds of its duty under Rule 52(a) of the Federal Rules of Civil Procedure by undertaking to duplicate the role of the district court. The district court found that the wasted holes in the hull rendered the vessel unseaworthy — it did not find that the failure of the portable pump rendered the vessel unseaworthy [App. A18-A-19]. By contrast, the court of appeal concluded that the wasted holes did *not* make the vessel unseaworthy, but instead found that the vessel was unseaworthy because of the failure of the pump. It then concluded that the owners (assureds) did not know of the pump failure, and on that basis declared that the due diligence proviso had no effect in this case [App. A5].

A finding of unseaworthiness by the trial judge is a factual finding which is protected by the "clearly erroneous rule" of Rule 52(a) from appellate disapproval. *Aquirre v. Citizens Cas. Co. of N.Y.*, 441 F.2d 141, 144 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971). Similarly, a finding that a party has knowledge of a relevant fact is a factual finding immune from reversal absent a conclusion that it was clearly erroneous. *Hercules Carriers, Inc. v. Claimant State of Florida*, 768 F.2d 1558, 1565 (11th Cir. 1985). Contrary to Supreme Court and Fifth Circuit precedent prohibiting such action, the appellate court conducted its own *de novo* review of the case, without examining the district court's

findings in light of all of the evidence, as required by the "clearly erroneous" provisions of Rule 52.

In performing its review under Rule 52, it is not the function of the reviewing court to make its own *de novo* factual inferences, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969), *Matter of Multiponics, Inc.*, 622 F.2d 709, 723 (5th Cir. 1980), even if it finds that it would have reached different factual conclusions, *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 976 (5th Cir. 1978). In discussing the obligations of a reviewing court under the "clearly erroneous" standard of review, this Court has stated that

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is *not* to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576 (1969). If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511 (1985). *See also, Amadeo v.*

Zant, ___ U.S. ___, 108 S.Ct. 1771, 1777 (1988). The court of appeal could only reach its result by substituting its own factual findings regarding the unseaworthiness of the vessel and the knowledge of the owners. In doing so, the Fifth Circuit acted contrary to its proper role as a reviewing court as set forth by the Supreme Court in *Anderson, supra*, and *Amadeo, supra*, and contrary to its own prior decisions. *See, Matter of Multiponics, Inc., supra*, and *Harrison, supra*.

The court of appeal reached this extraordinary result by implicitly overturning the unassailable (and unchallenged) factual findings of the district court that the vessel, due to its continually leaking condition, was unseaworthy [App. A17-A18], and that the owners knew of this condition [App. A19] and failed to use due diligence to correct it [App. A22]. Indeed, the Fifth Circuit's opinion notably omits mentioning that the district court not only found the vessel unseaworthy, but did so because the evidence of unseaworthiness — the uncontradicted testimony of all crew members that the vessel's hull was riddled with "wasted holes of longstanding nature" — was "inescapable." [App. A18] As the appellate court recognized, neither party to this appeal challenged the factual findings of the district court, i.e., the unseaworthiness of the vessel due to continous leaking caused by wasted holes in the vessel [App. A17-A18], and the owners' knowledge of that condition [A19].

If the district court had found the vessel unseaworthy solely because of a defective pump, this case would not have reached the appellate court. But the findings of the district court clearly establish, at the very least, that the vessel sank because of wasted holes which constituted a pre-existing unseaworthy condition known to the owners prior to the loss. It cannot be seriously contended that the

vessel was unseaworthy simply because of the pump failure, a condition which would have had no significance had it not been for the continuous flooding of the vessel's forward compartment through the wasted holes.

The district court's factual findings are plausible in light of the record as a whole and, as this Court has stated, "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson, supra* 470 U.S. at 574, 105 S.Ct. at 1511. By performing its own *de novo* review and implicitly reversing the trial court's findings, the court of appeal converted a concurring cause case into a sole cause case and avoided a legal issue of major importance to the maritime industry. Yet, by no rational process can it be concluded that the failure of the pump *alone* caused the sinking. By stating that, "we must conclude that the holes in the deck alone did not make the vessel unseaworthy," [App. A5] (emphasis added), the court of appeal conceded that there were concurring causes which resulted in the loss in this case.

As the appellate court noted, "pumping the water from the forward void was standard operating procedure" on the vessel [App. A4]. This was a fact known to the vessel's owner, and made the operation of the vessel precarious, enhancing the risk of loss and endangering the lives of the crew. The capsizing and sinking of the NO NAME #3 was brought about by the failure of the owner to correct a known unseaworthy condition (the wasted holes), *and* the failure of the master to exercise that extra degree of caution required to compensate for the pre-existing unseaworthy condition. These circumstances bring to this case tremendous "precedential value" in the marine insurance industry. Stated rhetorically, can there be any doubt at all that the Fifth Circuit's decision in this

case will reduce, rather than enhance, vessel owners' concerns about permitting the continued operation of leaking, unseaworthy vessels?

The appellate court avoided the dispositive legal issue — whether under the Inchmaree clause of a marine hull insurance policy concurring negligence of the master excuses the vessel owner's ongoing failure to repair known unseaworthy conditions without which the loss would never have occurred. That is the issue which the case presents and which should be answered, not avoided. It is an issue having exceptional importance to the maritime industry, yet no court has ever ruled explicitly on this point.

The court of appeal purports to ground its decision on its own "prior holdings", but in fact it had never before considered whether under the Inchmaree clause crew negligence is an insured risk if the vessel owner has not exercised due diligence. More to the point, neither this Court, nor the Fifth Circuit, has ever held that coverage exists under the Inchmaree clause where the vessel owner, like the defendant here, knowingly operated an unseaworthy vessel with an unseaworthy condition which contributed to the loss.

As the district court found, the master's decision to operate the vessel without a functioning pump was the immediate cause of the sinking, but should one therefore conclude, as have the district court and court of appeal, that the leaking hull (the very reason the pump was required) and the owners' knowledge of it were legally irrelevant? In this case, the vessel owner knowingly operated a leaking vessel requiring constant pumping. The coverage afforded by the Inchmaree clause cannot be determined without considering the vessel owner's obligation to exercise due diligence. Yet that is precisely what the court of appeal has

done and such a result is an open invitation to vessel owners to operate unsafe, unseaworthy, leaking vessels by relying on the continuous operation of pumps to keep them afloat.

CONCLUSION

This case cries out for review. The central issue presented relates directly to the risk of marine casualties, including the risk of pollution, and the safety of personnel employed in the maritime industry, and has never been decided by this Court. It is an issue which should not be resolved on the basis of incorrect findings of fact improperly substituted by the appellate court for factual findings of the trial court which were not contested by either party; nor should the issue be resolved on the mistaken assumption that it had been decided by previous decisions of this or any other court. By the substitution of its own factual findings for those of the trial court, the court of appeal created a new question for decision, entirely different from the case presented to it by the record and findings in the court below, and thus deprived the parties of a ruling on the very significant legal issue which directly relates to safe maritime commerce and the integrity of the environ-

ment. The case merits the attention of this court's supervisory powers.

Respectfully submitted,

MONTGOMERY, BARNETT,
BROWN, READ, HAMMOND
& MINTZ

By: _____

Of Counsel:
Henry J. Read

A. GORDON GRANT, JR.
3200 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-3200
(504) 585-3200
Counsel for Petitioner
United States Fire Insurance
Company

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-3083

UNITED STATES FIRE INSURANCE COMPANY,
Plaintiff-Appellant
Cross-Appellee,

versus

RIVERSIDE VENTURES, INC. and
NO NAME TOWING, INC.,
Defendants-Appellees
Cross-Appellants.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, _____F.2d_____)

(October 12, 1990)

Before GEE, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3083
Summary Calendar

UNITED STATES FIRE INSURANCE COMPANY,
Plaintiff-Appellant-Cross-Appellee,

V.

RIVERSIDE VENTURES, INC.
and NO NAME TOWING, INC.,
Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana
(88-504-K)

(September 12, 1990)

Before GEE, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Based on the stipulated facts, we must determine whether an Inchmaree clause[1] in a marine hull policy

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

[1] The Inchmaree clause takes its name from the Steamship Inchmaree involved in Thames & Mersey Marine Insurance Co. v. Hamilton Fraser & Co., 12 App. Cas. 484 (H.L. 1887). The clause in this case provided:

> This insurance also covers loss or damage to the vessel named herein directly caused by:
>
> Accidents in loading, discharging or handling cargo, or in bunkering;
>
> Accidents in going on or off, or while on drydocks, graving docks, ways, marine railways, gridirons or pontoons;
>
> Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part);
>
> Breakdown or accidents to nuclear installations or reactors not on board the vessel named herein;
>
> Contact with aircraft, rockets, or similar missiles, or with any land conveyance;
>
> Negligence of master, mariners, engineers or pilots;
>
> provided such loss or damage has not resulted from want of due diligence by the assured, the owners or managers of the vessel, or by any of them.

covers a loss caused by the captain's decision to continue underway after the failure of a temporary pump. We hold that the loss was due to the negligence of the captain and that, although the vessel was unseaworthy due to the pump failure, neither the owners nor the assureds had knowledge of the pump failure. Given our conclusion, we affirm the judgment of the trial court.

Facts

Riverside Ventures, Inc. and No Name Towing, Inc. owned, operated and insured the Mississippi River tow vessel *No Name* #3. United States Fire Insurance Co. issued the hull policy on *No Name* #3. For several months, the *No Name* #3 operated with a portable pump on her deck. The pump was used to remove water from the forward void (also known as the bow compartment), which frequently collected water. When the vessel was underway, water would enter the forward void through holes rusted at the junction of the deck and bow rail. Pumping the water from the forward void was standard operating procedure on the *No Name* #3. On the evening of November 17, 1987, after being underway for about half an hour, the *No Name* #3's evening deckhand, Mr. Tegtmeier, noticed an accumulation of water in the forward void and the captain, Mr. Aragon, ordered him to start the portable pump. Unfortunately, the pump would not start. Mr. Aragon, believing the pump needed more fuel, stopped at the Smith Fuel Dock where Mr. Tegtmeier got some fuel from an acquaintance on the *M/V Karche*. The captain of the *Karche* also offered to lend Mr. Tegtmeier a portable pump. Mr. Aragon put the *No Name* #3 back underway after being at the dock only three to five minutes. Meanwhile, Mr. Tegtmeier continued his unsuccessful efforts to start the pump and told Mr. Aragon about the *Karche's* offer to lend them a pump. Mr. Aragon decided to continue underway. About ten

minutes after leaving the Smith Dock the *No Name* #3 listed, Mr. Aragon reversed the engines, and the *No Name* #3 sank.

Analysis

The resolution of this appeal follows easily when our holdings are applied to the stipulated facts. To avoid coverage under an Inchmaree clause under such circumstances as these an insurer must show that the vessel was unseaworthy and that the owner or assured knew of the unseaworthiness. *See Tropical Marine Products, Inc. v. Birmingham Fire Ins. Co.*, 247 F.2d 116, 120-22 (5th Cir.), *cert denied*, 355 U.S. 903 (1957); *Saskatchewan Gov't Ins. Office v. Spot Pack, Inc.*, 242 F.2d 385, 388 (5th Cir. 1957).

Turning to the question of seaworthiness, this Court has held that a vessel is unseaworthy if it is not reasonably fit to perform its intended purposes. *See Walker v. Harris*, 335 F.2d 185, 191 (5th Cir. 1964). We have also held that a vessel need not be in perfect condition as long as it is maintained in a condition reasonably suited for its intended purpose. *See P.T. Tugs, Inc. v. United States Fire Ins. Co.*, 796 F.2d 125, 127 (5th Cir. 1986). In this case the parties agree that the *No Name* #3 had been performing its function as a tow boat for several months by using the portable pump to remove water from the forward void. Based on these facts, we must conclude that the holes in the deck alone did not make the vessel unseaworthy. The vessel did not cease to be reasonably suited for its intended purpose until the portable pump failed; thus, the unseaworthiness was due to the inoperative pump.

Given that the pump failed after getting underway on the evening of November 17, 1987, we conclude that neither the owners nor the assureds had any knowledge of the unseaworthy condition. Thus, the exculpatory provi-

sion of the Inchmaree clause does not bar coverage in this case.

The vessel sank because its captain chose to leave the safety of the Smith Fuel Dock, refused the offer of a loaner pump, and continued underway with an inoperative pump. Judge Brown noted in *Tropical Marine* that "[i]f a vessel has become unseaworthy due to the negligence of master or engineer in the maintenance of the vessel, in putting to sea without adequate equipment, fuel or stores, or without making required repairs at outports where the master is the sole principal representative of the owners, the 'cause' is negligence and this is expressly underwritten." 247 F.2d at 123. We are convinced that Mr. Aragon's actions, as captain of the *No Name* #3, fall squarely within the ambit of Inchmaree coverage. Furthermore, because neither the owners nor the assureds had knowledge of the pump failure, the Inchmaree clause's exculpatory language does not apply. Accordingly, we find that United States Fire Insurance Co. is liable under the hull policy issued to Riverside Ventures and No Name Towing; thus, we affirm the judgment of the trial court.

Conclusion

By applying our prior holdings to the stipulated facts in this case, we conclude that the insurer is liable under the Inchmaree clause and we AFFIRM the judgment of the trial court.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED JAN 17 90

UNITED STATES FIRE INSURANCE COMPANY	CIVIL ACTION
VERSUS	NO. 88-504
RIVERSIDE VENTURES, INC. and NO NAME TOWING, INC.	SECTION K (6)

MEMORANDUM OPINION

United States Fire Insurance Company brought this general maritime law action for declaratory judgment against defendants No Name Towing, Inc. ("No Name Towing") and Riverside Ventures, Inc. ("Riverside") arising from the loss by sinking of the M/V NO NAME #3 ("NO NAME") in the lower Mississippi River ("River") near the Greater New Orleans Bridge on November 17, 1987. No Name Towing was the owner of the vessel and Riverside was the charterer, operator and owner *pro hac vice* of the NO NAME. Plaintiff has asked the Court to determine whether its policy of hull insurance must respond to the vessel's loss. The defendants have counterclaimed for coverage and for punitive damages and attorney's fees for the plaintiff's bad faith refusal to pay their claim in contravention of La. Rev. Stat. Ann. 22:658 (West 1985). The parties have stipulated that the amount due the defendants if the plaintiff is found liable for the NO NAME's loss is $170,000.00.

DATE OF ENTRY — JAN 19 1990

The Court has jurisdiction over plaintiff's claim pursuant to 28 U.S.C. Section 1333 and defendants' counterclaim is within the Court's pendent jurisdiction. The case was tried to the Court without a jury and taken under submission. After considering the record, the evidence, arguments of counsel and briefing, the Court now issues its opinion.

FACTS

On or about June 13, 1987 the plaintiff issued a policy of marine hull insurance bearing policy no. 349 0068042 insuring the hull and machinery of the NO NAME. This vessel, a twin screw towboat built in 1968, was owned by No Name Towing; Riverside was its bareboat charterer, operator and owner *pro hac vice.* The policy contained a clause commonly known as an Inchmaree clause[1], which provided:

> This insurance also covers loss or damage to the vessel named herein directly caused by:

---

[1] The Inchmaree clause takes its name from the Steamship Inchmaree involved in *Thames & Mersey Marine Insurance Co. v. Hamilton Fraser & Co.*, 12 App. Cas. 484 (H.L. 1887). A check valve to one of the vessel's main boilers was either negligently closed or had been caused to stick because encrusted with salt through no one's fault, causing damage to a pump used on the boiler. When the ship's owner attempted to recover from the insurer for the resulting damage, the lower court held that coverage for the loss was provided under the policy's general proviso covering "all other perils, losses and misfortunes that have or shall come to hurt, detriment or damage, etc. [aside from the enumerated perils]." The House of Lords reversed this decision, however, holding that not only was the damage not covered by enumerated perils but it fell outside the language of the general clause as well. The Inchmaree clause then became a general fixture of marine insurance policies in order to comply with the Thames court's reading of such policies. *National Bulk Carriers, Inc. v. American Marine Hull Insurance,* 1949 A.M.C. 340.

> Accidents in loading, discharging or handling cargo, or in bunkering;
>
> Accidents in going on or off, or while on drydocks, graving docks, ways, marine railways, gridirons or pontoons;
>
> Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part);
>
> Breakdown or accidents to nuclear installations or reactors not on board the vessel named herein;
>
> Contact with aircraft, rockets, or similar missiles, or with any land conveyance;
>
> Negligence of master, mariners, engineers or pilots;
>
> provided such loss or damage has not resulted from want of due diligence by the assured, the owners or managers of the vessel, or by any of them.

It is on the basis of the "due diligence" provision of the clause that the plaintiff seeks to avoid coverage.

Riverside normally operated the NO NAME with two crews per day, each crew consisting of a captain and deckhand who worked twelve hour shifts. During July - September 1987, the NO NAME was not in operation since it was undergoing repairs to its hull.

At approximately 5:30 p.m. on November 17, 1987, the evening crew of Captain Jerry W. Aragon and deckhand Randy F. Tegtmeier assumed control of the NO NAME from the day crew, Captain Herb Swenty and deckhand Michael Bullock at Riverside's Shrewsbury Road fleet dock located on the Mississippi River near New Orleans, Louisiana. Reuben Bush and John Kendrick were the Riverside Port Captain and Assistant Port Captains respectively on that date. Upon boarding the vessel, Tegtmeier inspected the vessel and found, among other things, that the forward void of the ship's hold was essentially free of water.

The NO NAME'S first assignment that night was to proceed to the Amstar Corporation's sugar refining facility located on the Mississippi River below the Industrial Canal by 7:00 p.m. to take a vessel into tow. As was the NO NAME'S custom, a hatch that opened into the vessel's hold located just forward of the steering room was left open. A three inch portable bilge pump, used to pump water out of the vessel that collected in a void space below the deck at the vessel's bow, was placed by the hatch and the pump's hose extended into the hold's bow void. The day crew testified that on November 17, they pumped water out of the void three times during their shift. The last time the pump was used by that crew was approximately 3:30 p.m. They did not tell either Captain Aragon or Tegtmeier about the pumping but Bullock did mention this activity to Kendrick.

After Captain Aragon eased the NO NAME clear of the fleet dock and into the Mississippi River, he proceeded without tow ("light boat") at full throttle, ("hooked up") towards the Amstar refinery. While under way, water splashed over the bow bulwark of the vessel, some of it reaching the portable pump positioned near the open hatch.

About thirty minutes after leaving the fleet dock, when the vessel was located approximately abreast of the Audubon Park Zoo, the Captain noticed that the vessel felt "tender," i.e., that it rolled from side to side in the water, and asked Tegtmeier to check the bow void for water. The deckhand found that the void was about half full of water and he attempted to start the portable bilge pump. Tegtmeier was unable to start the pump, however, and reported the problem to Captain Aragon. The Captain instructed Tegtmeier to check the pump's oil, its fuel level and to clean the sparkplugs. After the deckhand performed these tasks, he was still unable to start the pump. Thinking that the pump might need more fuel, Captain Aragon asked another Riverside vessel it passed in the River (the M/V RIVERSIDE #1) for fuel. After the RIVERSIDE told him they could not help, the Captain proceeded at full throttle to the Smith Fuel Dock ("Smith dock") where Tegtmeier believed he could obtain gasoline to start the pump.

After arriving at the Smith dock, Tegtmeier identified the M/V KARCHE, a vessel on which an acquaintance worked, and he obtained some fuel to top the pump's fuel tank. Captain Aragon did not inspect the NO NAME at that time because he had "operated the boat like that before and didn't think we were in any kind of danger." Morris Lizana, the owner of the M/V KARCHE who was on board his vessel when the NO NAME entered the Smith dock, testified that the top of the NO NAME's bow bulwark was only about four inches above the water and the vessel's deck was well below the water level at that time. Lizana told Tegtmeier that the NO NAME could use the KARCHE's pump to remove water from the bow void while it was tied to the Smith dock. Tegtmeier returned to the NO NAME without responding to this offer.

After Tegtmeier obtained the fuel, no more than

three to five minutes after first arriving at the Smith dock, Captain Aragon returned the NO NAME to the River at approximately half throttle without waiting for Tegtmeier to start the pump. After getting underway, Tegtmeier told Captain Aragon of Lizana's offer to use the KARCHE'S pump to empty the bow void. Captain Aragon did not return to the Smith dock, however.

About ten minutes after leaving the Smith dock, Captain Aragon testified that he felt the NO NAME roll and that he responded by immediately throwing the engine into reverse. The stern then left the water and the vessel capsized and sank. Tegtmeier testified that just before capsizing, the bow void was about three-quarters full of water.

Riverside presented a claim for the loss to the plaintiff by letter dated January 8, 1988. This letter was forwarded to the plaintiff by Riverside's broker with a cover letter dated January 15, 1987 (sic). (The parties have stipulated that the cover letter's date was in error and should have been January 15, 1988).

Plaintiff promptly conducted an investigation of the claim by raising the vessel and having it inspected by Sheldon Held and Emilio Garcia, a marine surveyor and naval architect respectively. It also took depositions from the NO NAME's crew and shoreside management personnel. After a review of the evidence, plaintiff informed defendants by letter dated February 3, 1988 that the claim would be denied. Plaintiff then filed this declaratory judgment action.

DISCUSSION

There is no dispute over the immediate cause of the

vessel's sinking. The evidence adduced at trial compels the conclusion that water in the NO NAME's forward void caused the vessel to lack stability due to a physical principle called the free surface effect[2]. The parties hotly contest, however, how the water entered the vessel.

Defendants presented evidence and testimony to support their theory that water accumulated in the vessel's forward void through the open hatch through which the portable bilge pump's suction hose was introduced. Hjalmar "Del" Breit, Jr., qualified as an expert in marine surveying and naval architecture, testified that he did not believe the holes located at the juncture of the bow rail and the deck were large enough to allow a quantity of water sufficient to fill the forward void half to three quarters full during the approximately one hour voyage. He also said that the shape and slope of the NO NAME's deck would cause water splashing over the vessel's bow to drain away from the bow and towards the stern and not to flow through the wasted holes. A more likely explanation for the flooded forward void, he theorized, was that a number of large splashes generated by the NO NAME cutting through vessel wakes entered the void through the open hatch.

To adopt Breit's explanation requires, however, that the Court reject the factual accounts provided by the only eyewitnesses to the circumstances and events that occur-

---

[2] The free surface effect describes a physical action. Emilio Garcia, qualified at trial as an expert in naval architecture, explained that when a void space in a vessel becomes partially filled with water, the force of the water's movement within the void can cause the vessel to be unstable. If the same space was completely filled with water, however, the water could not move, so that no such unstabilizing force would be exerted on the vessel. In other words, there is no free surface effect in a space full of water since the water cannot move.

red during *the ill-fated voyage.* Both Aragon and Tegtmeier testified that the NO NAME encountered no large swells of water caused by the wakes of large ships or otherwise the night of the accident. Further, both testified that they saw no water flow through the open hatch. Both testified however, as did the NO NAME's day shift deckhand, Michael Bullock,[3] that water routinely splashed over the NO NAME's bow and, in fact, did so the night of the accident.

The NO NAME's work history also weighs heavily against the defendants' version of the manner in which the vessel's void became filled with water. Bullock testified that he had pumped the NO NAME's forward void dry three times during the twelve hours preceding the accident. He testified further that pumping water out of the void was a common occurrence whether or not the vessel encoun-

---

[3] Defendants argue that Bullock's testimony should not be given any weight since his credibility was destroyed by inconsistencies. Specifically, defendants point the Court to his statement on direct examination that he had told the Riverside Assistant Port Master about pumping the NO NAME's forward void three times during the day shift of November 17 and then his admission on cross examination that he in fact did not relate this information to that person at that time. They also point the Court to alleged inconsistencies in his accounts of the flow of water that splashed over the vessel's bow rail and how vigorously the water would splash.

The Court finds that any inconsistencies in Bullock's testimony are minor at best and do not detract from the credibility of the facts for which the Court cites his testimony. Bullock's account of his telling Kendrick of the holes in the vessel and the need to pump water out of the NO NAME's forward compartment was verified by Kendrick's deposition testimony. Kendrick also testified that he had been told of the holes two weeks earlier and had boarded the NO NAME to look at them. Bullock's testimony that the water splashing over the bow rail ran towards the corners away from the vessel's centerline is consistent with that of the other NO NAME crew members, Aragon and Tegtmeier. Based on Bullock's demeanor and other relevant circumstances observed during trial, the Court finds Bullock's testimony credible.

tered large waves of water that could have sent water into the forward void through the open hatch. Bullock also testified that he saw little if any water at all flow into the void through the open hatch and that bow splash ran to either side of the vessel's centerline, i.e., over the holes' location, and then aft. Tegtmeier and Aragon both corroborated this testimony. Bullock further said that there was a constant film of water at times as deep as one-half inch at the juncture of the deck and the bow rail where the holes were located and Tegtmeier testified that this area was constantly wet.

The testimony of Dr. O. Franklin Griffith, qualified as an expert in physics, who analyzed the estimated flow rates of the NO NAME's holes, supports the plaintiff's version of the events. Dr. Griffith estimated that the aggregate cross sectional area of all of the wasted holes was slightly more than 15 square inches. He calculated estimated flow rates through these holes by analogizing their rates to those associated with a circular hole with an area of 15 square inches.

Dr. Griffith's analysis (D-8) indicates that water would enter the forward void through the holes at a rate of a little more than 73 gallons per minute if the depth of the water over the holes, or the "head" of water, was 1.2 inches. At that flow rate, the bow compartment would take on 4,089 gallons of water during a 56 minute voyage, the length of time the defendants' records indicate the voyage required (D-20). Del Breit testified that the forward void contained 852 cubic feet, and therefore contains 6,373 gallons of water and that the 4,089 gallons of water generated by a 1.2 inch head of water over the wasted holes would have made the void almost 65% full, well past the point at which the free surface effect could substantially diminish the vessel's stability. The Court finds that a

preponderance of the evidence supports the conclusion that the water entered the vessel through a series of holes located along the juncture where the NO NAME's bow rail meets its deck.

Defendants assert that the NO NAME sank because of the negligence of her crew, particularly Captain Aragon, in not remaining at, or promptly returning to, the Smith dock, knowing that the vessel had taken on water and that her bilge pump was inoperable. They claim coverage under that provision of the Inchmaree clause providing coverage for master and crew negligence.

The plaintiff claims, on the other hand, that the vessel's loss was caused by wasted holes in the NO NAME's bow, that the vessel was thereby rendered unseaworthy and that the failure to maintain the vessel in a seaworthy condition violated the due diligence provision of the Inchmaree clause.

> The Inchmaree clause, in pertinent part, reads:
>
> [The policy] also covers the loss of damage to the vessel . . . directly caused:
>
> * * * *
>
> by negligence of master, mariners, engineers, or pilots;
>
> * * * *
>
> Provided such loss or damage has not resulted from want of due diligence by the assured, the owners, or managers of the vessel, or any of them. (P-1).

In order to trigger the due diligence proviso and thereby deny coverage under the facts of this case, there must be,

as a bare minimum, a showing that 1) the NO NAME was unseaworthy at the time it sank; 2) that a defendant — assured, owner or manager — knew of this unseaworthy condition and failed to take reasonable steps to prevent or repair it; and 3) that the unseaworthy condition proximately caused the loss. *Saskatchewan Government Insurance Office v. Spot Pack, Inc.*, 242 F.2d 385, 388 (5th Cir. 1957).

A. Unseaworthiness

Generally, the insurer bears the burden of proving unseaworthiness since a seagoing vessel is presumed to be seaworthy. *Lemar Towing Inc. v. Fireman's Fund Insurance Co.*, 352 F.Supp. 652, 660 (E.D.La. 1972), *aff'd*, 471 F.2d 609 (5th Cir. 1972). A vessel is unseaworthy if it is not reasonably fit to perform its intended purposes. *Walker v. Harris*, 335 F.2d 185, 191 (5th Cir. 1964). As the *Walker* court explained:

> the subsidiary questions leading to the ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny sufficient to withstand those anticipated forces? *Id.* At 191.

That the wasted holes rendered the NO NAME unseaworthy cannot reasonably be disputed for the reasons discussed above. The vessel was chartered to shift barges on inland waters and rivers in and around the Port of New Orleans. This service required it to withstand the stresses of normal conditions encountered in moving fully loaded barges upstream against the currents of the Mississippi River. The uncontradicted testimony of the NO NAME's crew members, Aragon, Bullock and Tegtmeier, as well as experts Sheldon Held and Emilio Garcia, indicated that

the wasted holes were of a longstanding nature and were the result of deterioration, leading inescapably to the conclusion that the NO NAME was unseaworthy.

The simple fact that the NO NAME had no permanent bilge pump for the bow void, however, does not make the vessel unseaworthy. The evidence in this case indicates that the three inch pump used on the NO NAME was adequate for the task of clearing the void of water that collected there. Until the voyage during which the NO NAME sank, the crew had successfully used the pump to remove accumulated water for months without incident. While the routine nature of the flooding might have made a permanent bilge pump a desirable feature for the NO NAME, the warranty of seaworthiness does not require that the vessel owner keep the ship in perfect condition; the vessel must only be maintained in a condition reasonably suited for its intended purpose. *P.T. Tugs, Inc. v. United States Fire Insurance Company*, 796 F.2d 125, 127 (5th Cir. 1986); *Spot Pack*, 242 F.2d at 388. Based on the evidence adduced at trial, regular use of the three inch portable pump used on the NO NAME, and the lack of a permanent bilge pump on this vessel, did not render it unseaworthy.

B. Knowledge

In order for the due diligence provision of the hull policy's Inchmaree clause to void coverage for this casualty, plaintiff must prove by a preponderance of the evidence that the vessel's owner had knowledge of the unseaworthy condition, — in this case, the wasted holes. *P.T. Tugs, Inc. v. United States Fire Insurance Company*, 796 F.2d 125, 127 (5th Cir. 1986); *Tropical Marine Products, Inc. v. Bermingham Fire Insurance Company of Pennsylvania*, 247 F.2d 116, 120-21 (5th cir. 1957), *cert. denied*, 355 U.S. 903, 78 S.Ct. 331 (1957). There can be no doubt that No Name

Towing had actual knowledge of the wasted areas in the NO NAME's bow. Assistant Port Captain Kendrick testified that he had been informed that the crew had to pump water out of the forward void every day after repairs to the hull had been accomplished and, in fact, that he had been told by the day crew on the date of the casualty that they had pumped a couple of feet of water out of the forward void that afternoon. The NO NAME's morning reports (P-3) and its logs (P-47) also indicate (and therefore Kendrick and Bush, the recipients of these reports, were apprised) of the continued need to pump water out of the forward void after repairs were made. This persistent problem, serious enough to require pumping virtually every day, should have caused Riverside's shoreside managers to determine the cause of the ingress of the water into the bow void and to repair it. Certainly they knew of the problem.

In addition, since the due diligence provision disclaims coverage for lack of due diligence "by the assured, the owners or managers of the vessel, *or by any of them*" (emphasis added), the proviso is activated whether or not Riverside, as the vessel's manager and as an assured under the hull policy, could be held to be in strict privity with No Name Towing[4].

---

[4] Should actual privity be deemed a necessary prerequisite to the application of the Inchmaree clause at issue in this case, the evidence clearly shows its presence here. The parties have stipulated that No Name Towing was the owner of the NO NAME and that defendant Riverside was the bareboat charterer, operator and owner *pro hac vice* of this vessel. Because of this owner *pro hac vice* status, Riverside is considered to be in privity with No Name Towing. *Reed v. Steamship Yaka*, 373 U.S. 410, 412, 83 S.Ct. 1349, 1351-52 (1963); *Blanco v. United States*, 775 F.2d 53, 57-58 (2d Cir. 1985). The knowledge of the wasted holes attributable to Riverside is also chargeable against No Name Towing. *Spot Pack*, 242 F.2d at 389.

C. Causation

Plaintiff must also prove that the unseaworthy condition of the wasted holes was the proximate cause of the sinking of the NO NAME. In the context of determining coverage under an insurance contract, proximate cause is the "predominant or determining" or "efficient" cause of the loss, a determination which is a matter of applying common sense and reasonable judgment as to the source of the loss alleged. *Insurance Co. of North America v. John J. Bordlee Contractors,* 532 F.Supp. 774, 785 (E.D. La. 1982) (*citing, Blaine Richards & Co. v. Marine Indemnity Insurance Co.,* 635 F.2d 1051, 1054-55 (2d Cir. 1980). Courts have defined proximate cause in this context as the cause "*which is most nearly* and essentially connected with the loss as its efficient cause." *Standard Oil Co. of New Jersey v. United States,* 340 U.S. 54, 58, 71 S.Ct. 135, 137 (1950).

While the Court has found that the wasted holes in the NO NAME's deck rendered it unseaworthy, the Court cannot find under the facts of this case that the wasted areas in the NO NAME's bow constituted the "efficient, predominant or determining" cause of the vessel's sinking. On the contrary, the evidence is clear and leads inescapably to the conclusion that the vessel's captain was negligent in leaving the Smith dock before ensuring that the vessel could safely continue its anticipated voyage and that this independent act was the immediate cause of the vessel's loss. The evidence clearly shows that the NO NAME had been safely operated in its current condition over a prolonged period of time. Its masters, including Captain Aragon, had frequently navigated the NO NAME with water in the bow void before. His actions the day of the accident — including repeated efforts through his deckhand to get the pump started in order to remove the water from

the void, and changing course to stop at the Smith dock — show he was well aware that operating the vessel without an operating bilge pump was, at best, unsafe and dangerous. It is also clear that he had the opportunity — indeed, the obligation, — to avoid the loss simply by not leaving the safety of the Smith dock until the bow water had been removed, or at least until he was satisfied that the pump would start and operate properly.[5]

The Court has held that the vessel was unseaworthy. That the defendants knew about the condition is likewise clear. Had the NO NAME sunk while traversing the River without having first put into the Smith dock, policy coverage certainly would have been voided because the connection between the loss and the defendants' lack of due diligence in maintaining the vessel in a seaworthy condition would be unbroken.

But the NO NAME *did* put into the Smith dock because her forward void was taking on water, the captain knew it required pumping and the pump would not start. She put into the dock in an effort to get the pump started because once started, it was reasonable to anticipate that it would quickly clear the forward void, as it had numerous times in the past.

---

[5] The defendants go so far as to accuse Captain Aragon and Tegtmeier of barratry. *Fishing Fleet, Inc. v. Trident Insurance Co.*, 598 F.2d 925 (5th Cir. 1979). The *Fishing Fleet* court defines barratry as "in the absence of fraud, nothing but acts of known criminality, gross malversation and the like." *Id.* at 927-28. Simple negligence of the crew cannot be barratry. *Id.*.

Whatever the culpability of the NO NAME's crew for this loss, no evidence at all even hints at the type of acts that support a charge of barratry. The Court rejects this theory.

Surely the captain knew, or should have known, that resuming the voyage without an operable bilge pump, wagering on the probability that his deckhand would somehow get the pump started before the water level in the void reached a critical stage, was fault — negligence — of the rankest kind.

It also represented the interjection of a new, separate, proximate, and efficient causal link into the chain of events.

Prior to departing the Smith dock, the NO NAME occupied a position of safety. She would have taken on no "splash" water over her bow while at the anchorage and she was in no danger of either capsizing or sinking at that time.

The captain's negligent decision to leave this safe harbor, and to renew his voyage without the benefit of an operative bilge pump, was a new, separate and intervening act which caused the vessel's loss. In essence, the captain made the decision to begin a new voyage (or, more properly, to renew an interrupted one) without the service of a working bilge pump, and with the forward void of his vessel already containing a substantial quantity of water. It was this decision which constituted the efficient, proximate and legal cause of the vessel's loss. She sank because the captain did not keep his vessel in a safe harbor until he had an operable bilge pump — the one appliance which he well knew he needed to keep his forward hold tolerably dry.

As for statutory penalties and attorney fees, the Court does not find them in order. While plaintiff was wrong in the decision it reached, the evidence does not even indicate that it was in any manner arbitrary, capricious or otherwise guilty of such fault as would constitute a violation of La. Rev. Stat. Ann. Section 22:658 (West 1985). It

promptly investigated the claim, thoroughly evaluated the evidence concerning the sinking which it had (at obvious expense) secured and furnished a reasonable basis for the claim's denial. The circumstances present here are not such as to justify penalties and attorney fees.

IT IS ORDERED that:

1. Defendants' Motion For Involuntary Dismissal pursuant to Federal Rule of Civil Procedure 41(b) is DENIED.

2. For the reasons stated above, there will be judgment in favor of defendants and against the plaintiff in the full amount of the stipulated claim, plus interest from the date of demand until paid; defendants' claims are otherwise DENIED.

/s/ Illegible